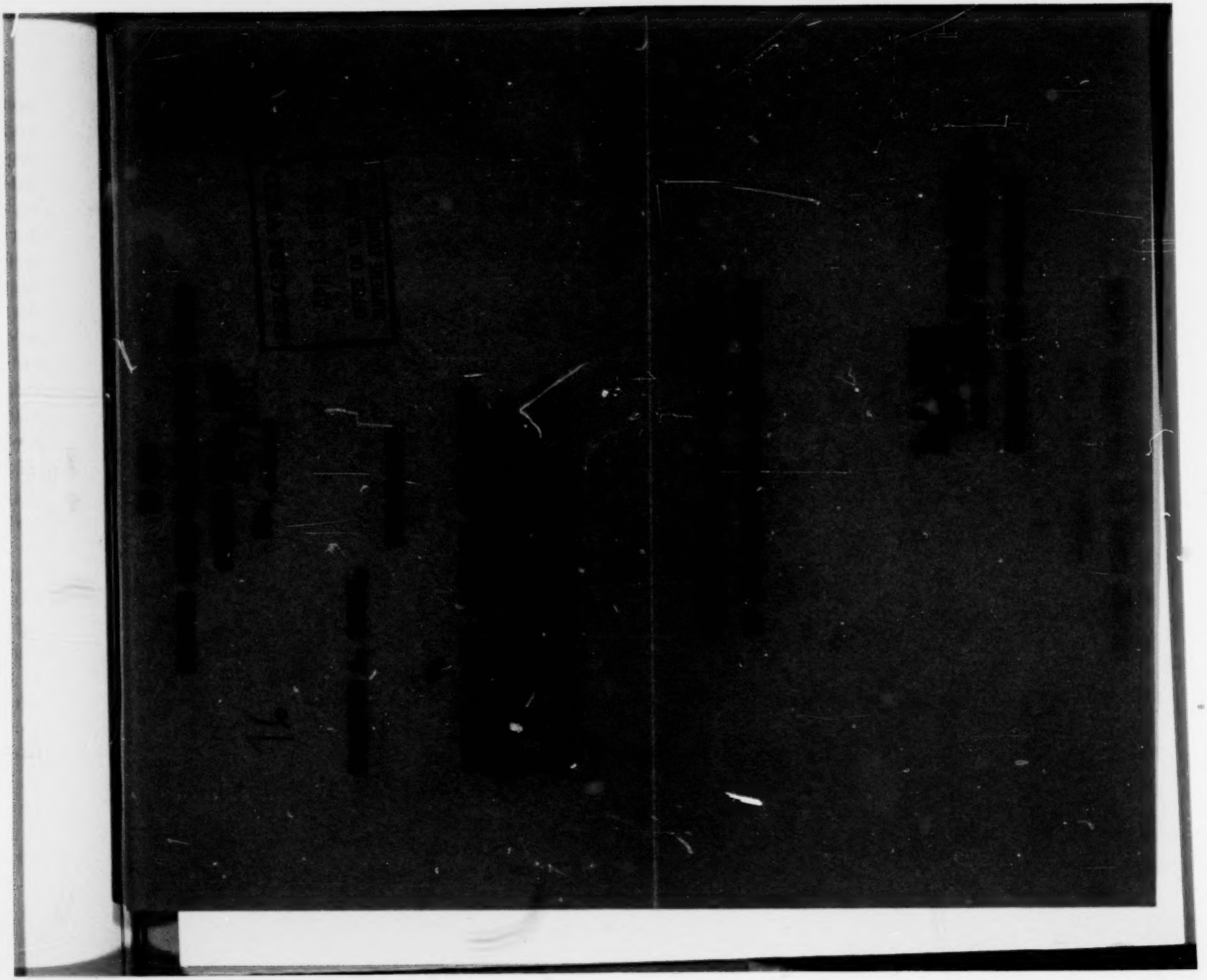

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. _____

MARJORIE A. BOWEN,

Petitioner,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY CIVIL SERVICE COMMISSION; ARTHUR J. WILL, as Superintendent of the Deparment of Charities, County of Los Angeles; J. M. LOWRY, as Auditor, County of Los Angeles.

PETITION FOR WRIT OF CERTIORARI

TO THE CALIFORNIA SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the California Supreme Court, (Opinion, 1)[1/] denying, except as to one month's salary, petitioner's petition for writ of mandate for reinstatement to her position as a permanent civil service employee of Los Angeles County.

OPINION BELOW

This was an original proceeding in the court below

1/ The petition herein is in forma pauperis and so the record is not yet printed. References to the record will be to the documents themselves which have been certified by the Clerk of the Court below.

whose opinion is reported at 39 Cal. 2d 714, 249 P. 2d 285. No opinion was rendered on denial of re-hearing nor upon denial of petitioner's motion for correction of order for writ of mandate. In each instance, one justice dissented.

JURISDICTION

The judgment of the California Supreme Court was entered on October 17, 1952 (Opinion 1). The order denying re-hearing was entered on November 14, 1952(Order dated Nov. 14, 1952). On January 28, 1953, following the opinion of this court in Wieman v. Updegraff, ___ U.S. ___, 97 L.ed. (adv. op.) 162, petitioner filed a petition for correction of order for writ of mandate. On February 11, 1953, Justice Clark of this Court extended time within which to file petition for writ of certiorari to and including April 13, 1953 (Order of said date). On February 16, 1953 the court below, one justice dissenting, denied the petition for correction (Order dated Feb. 16, 1953).

The jurisdiction of this Court is invoked under 28 USC 1257(3) and 2101(c).

STATUTES INVOLVED

The pertinent portions of California Government Code 3100-3109 in issue here are:

Sec. 3100: "It is hereby declared that the defense of the civil population during the present state of world affairs is of paramount state importance requiring the undivided

attention and best efforts of our citizens. In furtherance of such defense and in the exercise of police power of the State in protection of its citizens, all public employees are hereby declared to be civil defense workers subject to such civilian defense activities as may be assigned to them by their superiors or by law."

Sec. 3102: "... all civil defense workers shall within the five days prior to their employment or within the first 30 days of employment take and subscribe to the oath or affirmation required by this chapter. ..."

Sec. 3103: "The oath or affirmation required by this chapter is as follows:

"'I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge

the duties upon which I am about to enter.

"'And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words 'No Exceptions')

and that during such time as I am a member or employee of the ..... (name of public agency) I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means.'"

Sec. 3107: "No compensation nor reimbursement

for expenses incurred shall be paid to any civil defense worker by any public agency unless such civil defense worker has taken and subscribed to the oath or affirmation required by this chapter. ..."

STATEMENT

Facts -- Petitioner was a permanent civil service employee of Los Angeles County (Pet. for Writ of Mandate, 2) who was discharged solely (Ibid, 6) because she refused, by reasons of conscience (Ibid) and on constitutional grounds, (Ibid, Exh. A to Exh. C) to sign the oath and affidavit required by the California Levering Act, portions of which were above set out (Calif. Govt. Code 3100 et seq.).[2/]

Decision Below -- The opinion of the court below (39 Cal 2d 714) is in the main concerned with state questions. The Federal questions here raised were disposed of by reference (Opinion 2) to the lower court's opinion in Pockman v. Leonard, 39 Cal 2d 676, 249 P. 2d 267.[3/]

The lower court held in the Pockman case that the

2/ Prior to this, petitioner had signed the Los Angeles County Oath in issue before this court in Petherbridge v. County of Los Angeles, No. ___, Oct. Term 1952. She had done so reluctantly, because of conscientious doubts as to whether she should. After having signed, she regretted so doing because she felt she had violated the dictates of her conscience. And so, when the additional Levering Act oath came along, she refused to sign. (Pet. for Writ of Mandate, 6).

3/ Petitioner is advised that petition for Writ of Certiorari in that case was to be filed in this court.

Act does not violate any of petitioner's constitutional rights either as to the conscription or oath features; that although a political or religious test oath would be invalid, the oath here is not such an oath. The court held that "political" imports orderly conduct of government, not revolution. It so held, despite the fact that the oath itself refers to organizations, "political or otherwise" that advocate or advocated the overthrow of the government by force or violence or other unlawful means.

The court interpreted the oath as requiring scienter, citing this court's opinion in Garner v. Board of Public Works, 341 U.S. 716.

Finally, the court held that a limited writ of mandate should issue because the County put the law into effect too soon.

There was a vigorous dissent by Justice Carter.

The court rendered no opinion in denying re-hearing nor in denying petition to correct order for writ of mandate.

QUESTIONS PRESENTED

1. Was petitioner deprived of due process of law by not being permitted to take the oath as construed by the court below?

2. Does the conscription by the legislation of all public employees as civil defense workers subject to unknown assignments constitute:

a. improper control by the state over civilians without justification therefor

b. a delegation of power without sufficient standards

c. a violation of the 13th Amendment to the United States Constitution?

3. Does the oath requirement of the Levering Act violate the freedom of speech, assembly and religious guarantees of the 1st and 14th Amendments?

4. Does the oath requirement constitute a violation of Art. 1, Sec. 10 of the United States Constitution as a Bill of Attainder or Ex Post Facto law?

REASONS FOR GRANTING THE WRIT

1. The court below, by refusing to allow petitioner to take the oath as construed by that court, has disregarded this court's decision in Wieman v. Updegraff, ___ U.S. ___, 97 L.ed. (adv. op.) 162.

2. Grave questions of public concern are involved in this legislation which has not been, but should be, decided by this court. Present in the legislation at issue is a broad order by the legislature conscripting, at one fell swoop, all public employees into civilian defense. This awesome power exercised by the legislature should be reviewed by this court.

I

The Court below had Disregarded

This Court's Holding in Wieman v. Updegraff, ___ U.S. ___, 97 L.ed. (adv. op.) 162

Shortly after this court's opinion in the Wieman case became final, petitioner filed with the court below a petition for correction of order for writ of mandate. In that petition, this court's decision in Wieman was called to the attention of the court below. It was pointed out to that court that its decision that the Levering Act oath required scienter did not dispose of the issue; that petitioner must, lest she be denied due process, be given an opportunity to take the oath as interpreted, since the interpretation given by the State Supreme Court did not appear as the face of the statute.

This language of this court in Wieman was called to the attention of the court below:

> "We assumed in Garner, (the court below had cited Garner in construing the oath as requiring scienter) that if our interpretation of the oath as containing an implicit scienter requirement was correct, Los Angeles would give the petitioners who had refused to sign the oath an opportunity to take it as interpreted and resume their employment."

Despite this, however, the lower court denied the

petition (Order dated Feb. 16, 1953). One justice voted to grant it (Ibid).

The case, then, is in precisely the same posture as was the Wieman case before this court. Although the court below said that intent was required, its refusal to permit petitioner to take the oath as the court had interpreted it, amounted to action to the effect that no intent was required. As in Wieman, therefore, petitioner has been denied due process.

II

THE CONSCRIPTION FEATURES OF THE LEGISLATION ARE UNCONSTITUTIONAL

California Government Code Section 3100 (quoted in full above) provides that

> "... all public employees are hereby declared to be civil defense workers subject to such civilian defense activities as may be assigned to them by their superior or by law."

In other words, all public employees, including petitioner, suddenly found themselves conscripted.

A

The Act Denies Petitioner Equal Protection of the Laws

It will be noted that only public employees are conscripted for civilian defense. Those citizens employed

by private industry and the self-employed are exempted.[4] Although the section (Govt. Code 3100) which blankets in all employees as civilian defense workers says that the current state of world affairs requires "the undivided attention and best efforts of our citizens", no effort is made to enlist the efforts of our citizens. Only public employees are singled out for treatment.

The classification here used by the state is in no sense reasonable nor does it have a fair and substantial relation to the object of the legislation. If it be a fact that the undivided attention and best efforts of our citizens are required, then a classification which singles out citizens who happen to be public employees is patently arbitrary and unreasonble. Contrast the legislation here with the Selective Service Act of 1948 (50 USC Appx 451) where the basis of classification is related to the object of the Act, and the basis of equal treatment.

Petitioner does not contend that the state does not have the power to classify, but in so doing, the classification must not be arbitrary and must be based on some substantial distinction (Power Manufacturing Co. v. Saunders, 274 U.S. 490), resting on some fair and substantial grounds of difference (Hartford Steam Boiler Inspection and Insurance Co. v. Harrison, 301 U.S. 459).

4/ As well as aliens who are legally public employees (Calif. Govt. Code Sec. 3101).

The classification here offends these principles.

B

The Act Imposes Invalid Control Over Civilians without Justification therefor and invades Federal Powers

No condition of martial law nor of threatened invasion or disaster, etc. is suggested as being present in California. The legislature simply found that "the present state of world affairs is of paramount state importance". This is a far cry from the justification which would justify such arbitrary control over the lives of civilians which the act contemplates.5/ See Duncan v. Kahanamoku, 327 U.S. 304; Sterling v. Constantin, 287 U.S. 378; Ex Parte Spurling, 66 F. Supp. 997.

In times of extreme emergency fundamental constitutional rights have been allowed temporary abridgment (Hirobayashi v. U.S., 320 U.S. 81), but this court made it very clear that the emergency must be grave and extremely severe and the circumstance must be most exceptional.

It would seem clear that the state could not conscript its citizens for war (Art. I, Sec. 8, Cl. 11). No more can it conscript as it has done here, at least in the absence of a valid declaration of martial law.

5/ Public employees are "subject to such civilian defense activities as may be assigned to them by their superior or by law."

C

The Act Violates Due Process of Law

(1)

It is vague, indefinite and uncertain and delegates sweeping and arbitrary power without laying down any or sufficient standards.

Section 3100 of the Government Code says that public employees are "subject to such civilian activities as may be assigned to them by their superior or by law."

No effort is made by the legislature to define what these assignments may be, not even what civil defense activities are. The legislature has entrusted this vital part of the public employees very lives to unknown superiors ordering them to do unknown activities without any standards or guides at all. There is not even provided a basis for the promulgation of administrative rules. Hereinafter every public employee is subject to the whim and caprice of his every superior, who has authority, apparently, to cause activities without any semblence of direction or control.

While a legislature may delegate authority, it has no power, as California has done here, to so do without providing adequate standards. (United States v. Cohen Grocery Co., 255 U.S. 81; Panama Refining Co. v. Ryan, 293 US. 388; Schechter Poultry Corp. v. U.S. 295 U.S. 495; Lanzetta v. New Jersey, 306 U.S. 451; Connally v. General Construction

Co., 269 U.S. 385; Winters v. N.Y., 333 U.S. 507).

III

THE OATH VIOLATES ART. I, SEC. 10(1)
OF THE UNITED STATES CONSTITUTION

In Garner v. Board of Public Works, 341 U.S. 716, this court made it very clear that the reason it was upholding the retroactive features of the Los Angeles City Ordinance was the presence of the Los Angeles City Charter provision which had, prior to the time the oath features took effect, prohibited city employment to persons on the same ground as the oath requirement. Said this court (341 U.S. at 721):

> "... The activity covered by the oath had been proscribed by the Charter in the same terms, for the same purpose, and to the same effect over seven years before, and two years prior to the period embraced in the oath. Not the law but the fact was posterior."

But no such saving provision is present in the case at bar. Here there is no charter provision in effect prior to the promulgation of the County's affidavit requirement, nor was there any "posterior fact" at work. Here County employees are being punished today on the basis of lawful conduct of the past.[6/]

6/ Cf. ACA v. Douds, 339 U.S. 382, 413, wherein this

That discharge under such circumstances is punishment has again been recognized by this court only this term. In the Wieman case, this court said (97 L.ed. (adv. op.) at 166, 167):

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.' ..."

C O N C L U S I O N

The Petition for Writ of Certiorari to the California Supreme Court should be granted.

Respectfully submitted,

A. L. WIRIN

FRED OKRAND

Attorneys for Petitioner

6/ cont.: court distinguished U.S. v. Lovett, 328 U.S. 303; Ex Parte Garland, 4 Wall (U.S.)333; and Cummings v. Missouri, 4 Wall (U.S.) 277 specifically on the ground that in the cases cited the individuals involved were in fact being punished for past actions, but that in the Douds case "they are subject to loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transferred into future conduct." Thus the Douds case recognized that in a case such as the case at bar, the Lovett, Garland and Cummings cases control.

17

No. 469 MISC.

FILED

MAY 20 1953

HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1952

MARJORIE A. BOWEN,

Petitioner,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY CIVIL SERVICE COMMISSION; ARTHUR J. WILL, as Supterintendent of the Department of Charities, County of Los Angeles; J. M. LOWERY, as Auditor, County of Los Angeles,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

HAROLD W. KENNEDY, County Counsel
and
GERALD G. KELLY, Assistant County Counsel
and
JAMES W. GOODMAN, Deputy County Counsel
1100 Hall of Records
Los Angeles 12, California,

Attorneys for Respondents.

WESTERN PRINTING COMPANY, WHITTIER

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IN THE

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OCTOBER TERM, 1952

MARJORIE A. BOWEN, *Petitioner,* v. COUNTY OF LOS ANGELES; LOS ANGELES COUNTY CIVIL SERVICE COMMISSION; ARTHUR J. WILL, as Supterintendent of the Department of Charities, County of Los Angeles; J. M. LOWERY, as Auditor, County of Los Angeles, *Respondents.*	No. .....

ANSWER TO PETITION FOR WRIT OF CERTIORARI

I.

THE DECISION OF THE CALIFORNIA SUPREME COURT IN BOWEN v. COUNTY OF LOS ANGELES, 39 Cal. 2d 714, 249 P. 2d 285 (1952), IS NOT IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF WIEMAN v. UPDEGRAFF, 97 L. Ed. Adv. Ops. 162 (1952).

The Supreme Court of the United States in *Wieman v. Updegraff* had before it an oath which, as construed, meant that employees were disqualified from taking the oath if they had formerly been members of any subversive organization regardless of whether or not they knew of its subversive character at the time of membership, and the effect of ineligibility to take the oath was disqualification from public employment. The Supreme Court declared, at page 166:

> "We are thus brought to the question touched on in Garner, Adler, and Gerende: whether the due process clause permits a state in attempting to bar disloyal individuals from its employ to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they have belonged *For, under the statute before us, the fact of membership alone disqualifies.*" (Emphasis added).

This is not the situation before the Court in the present petition for certiorari.

Under the provisions of Section 3103 of the Government Code of the State of California, past membership in any organization never has disqualified an employee in California from taking the loyalty oath and never has been a ground of disqualification for public office.

Marjorie Bowen was discharged because she *refused* to execute the oath required by the Legislature

of the State of California as set forth in California Government Code Section 3103.*

She was not disqualified from taking the loyalty oath in California because she was formerly a member of any organization nor would she have been discharged from her employment if she did execute the loyalty oath and indicate past membership in an organization. It is therefore clearly apparent that the decision of the California Supreme Court in *Bowen v. County of Los Angeles* does not fall within the purview of the United States Supreme Court decision in *Wieman v. Updegraff.*

The case at bar falls within the narrow scope of that portion of the decision of the Supreme Court of the United States in *Garner v. Board of Public Works,* 341 U. S. 716, 95 L. Ed. 1317 (1951), which relates to

---

*"Section 3103. The oath or affirmation required by this chapter is as follows:

"'I, ... , do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"'And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words "No Exceptions")

and that during such time as I am a member or employee of the.....

(Name of public agency)

.....I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."

the affidavit requirement. Therein, at 341 U. S. 720, this Court declared:

> "The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. *Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.* (Emphasis added).

The Court in the *Garner* case in construing the *affidavit* clearly held that employees could be required to list subversive organizations of which they were or had been members. In the quote above we have added emphasis to the situation which most clearly applies here. Not before the Court in this petition for *certiorari* is the question whether the County may determine that an employee's disclosure in the oath required by Section 3103 of the Goveriment Code of the State of California justifies his discharge. Marjorie Bowen had already executed the Los Angeles County loyalty oath and had not been discharged because of the information which she furnished in that oath, and there is not one scintilla of evidence in the record which would indicate that she would have been discharged for any information that she would have provided in the oath required by Section 3103 of the California Government Code. (Petitioner's Petition, page 5).

Emphasis is added to the conclusion that the oath required of Marjorie Bowen pursuant to the Califor-

nia Government Code does not fall within the bar of *Wieman v. Updegraff* by an examination of *Garner v. Board of Public Works,* 341 U. S. 716, 95 L. Ed. 1317 (1951); *Adler v. Board of Education,* 342 U. S. 485, 96 L. Ed. 517 (1952); and *Gerende v. Board of Supervisors,* 341 U. S. 56, 95 L. Ed. 745 (1951).

Garner involved, in addition to the review of an affidavit requirement which we have heretofore discussed, a Los Angeles City ordinance requiring all city employees to execute an *oath* that they did not belong to organizations which advocated the overthrow of the government by force and violence and had not belonged to such organizations during the preceding five (5) years. The question arose as to whether an employee who had formerly belonged to a subversive organization but was innocent of its purpose could take the *oath* and the Court was thus presented with a question of scienter. The Court construed the *oath* and found no legislative intent that employees who had innocently been members of subversive organizations were disqualified from taking the *oath.* Obviously, if past innocent membership in such an organization did disqualify, he could not execute the *oath* and therefore would be discharged from his employment; and as discharge would so result, the problem of scienter was clearly before the Court. In this regard, the Court declared:

> "We have no reason to suppose that the *oath* is or will be construed by the City of Los Angeles or by California courts as affecting adversely those

persons who during their affiliation with a proscribed organization was innocent of its purpose, or those who severed their relations with any such organization when the character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the ordinance were engaged in proscribed activity but not at the time of affiant's affiliation." (Emphasis added).

The Court in construing the oath (*not the affidavit*) in the *Garner* case, as in the oath in the *Updegraff* case, was presented with the problem of scienter. In the instant case, as in the *affidavit* in the *Garner* case, no problem of scienter is involved since past membership in any subversive organization with or without knowledge of a subversive purpose does not disqualify an employee from taking the oath or continuing employment. Petitioner would not be prevented from taking the oath because of past membership. She would merely indicate past membership. The point is further emphasized by reference to *Adler v. Board of Education,* 342 U. S. 485, 96 L. Ed. 517 (1952). Therein under the statute in question it was possible for an employee to be found unfit and disqualified from employment in the public school system *because of membership in a listed organization.* The statute established that membership in an organization which advocated the overthrow of the government by force and violence shall constitute *prima facie* evidence of disqualification. Because discharge could result, the element of

scienter was involved, and this Court pointed out in *Wieman v. Updegraff:*

> "In upholding this legislation [the Feinberg Law], we expressly noted that the New York courts had construed the statute to require knowledge of organizational purpose. . . ."

before the discharge could be effected.

In *Gerende v. Board of Supervisors,* 341 U. S. 56, 95 L. Ed. 745 (1951), the Supreme Court approved an oath which if not taken would bar a candidate from the ballot. In approving such an oath which would bar a candidate from the ballot, the Supreme Court indicated that it was assuming that the oath would be construed as a requirement that the affiant declare that he was not a person who was engaged " 'in one way or another in the attempt to overthrow the government *by force or violence,*' " so where it was necessary for the affiant to negate membership, knowledge was inferred.

In the instant situation, the execution of the oath does not constitute a bar to employment; and furthermore the individual does not negate membership but expressly lists membership and can only affirmatively list membership if he knew of his membership, and therefore the oath requirement in the *Bowen* case, before this Court in this petition for certiorari is completely consistent with the prior pronouncements of the United States Supreme Court.

So far as an opportunity to take the oath after judicial interpretation is concerned the case of *Wieman v. Updegraff* is limited to the situation where a question of interpretation is involved. No question of interpretation is presented here. It is clear from the oath before the court that the organizations to be listed are only those known by the affiant to be subversive. The language of the oath is also clear that past affiliations, innocent or otherwise, do not prevent an employee from taking the loyalty oath nor disqualify him from public employment. It is only where an employee would be discharged for membership indicated in an oath and the language of the oath is ambiguous and requires interpretation that the individual's due process would be denied if he were not given an opportunity to take the oath as construed. In the instant case, the construction which the Supreme Court of the State of California placed upon the oath was an obvious construction that existed from the outset and constituted no change in the clear language of the statute. Due process does not mean that every time an oath is interpreted by a court, the employees in question must be given an opportunity to retake the oath as so interpreted.

Section 3103 of the Government Code of the State of California sets forth the oath requirement. It does not require that an individual declare that he has never been a member of an organization that advocates the overthrow of the Government by force and violence; it requires him to list such organizations of

which he has been a member. Obviously, he cannot lists such organizations unless he knew that he was a member of the organization and knew that the organization advocated the overthrow of the government by force and violence. This oath does not require negation on behalf of the employee but an express declaration that he was a member of an organization that advocated the overthrow of the government by force and violence. In view of this obvious intent, the only interpretation which could have been given to this section was that which it had from its outset as expressed by the Supreme Court of the State of California in *Pockman v. Leonard,* 39 Cal. 2d 676 [249 P. 2d 267] (1952), wherein the Court said at page 685:

> ". . . the oath provisions relating to membership can reasonably be construed as referring only to affiliation with organizations *known* by the employee to belong to the proscribed class, and each clause of the oath must be interpreted as requiring knowledge of the character of any group as to which a declaration is required."

II.

THE DECLARATION CONTAINED IN SECTION 3100 OF THE CALIFORNIA GOVERNMENT CODE THAT PUBLIC EMPLOYEES ARE CIVIL DEFENSE WORKERS DOES NOT DEPRIVE PETITIONER EITHER AS A PUBLIC EMPLOYEE OR AS AN INDIVIDUAL OF EQUAL PROTECTION OF THE LAWS.

Section 3100 of the California Government Code reads as follows:

> "Sec. 3100. It is hereby declared that the defense of the civil population during the present state of world affairs is of paramount state importance requiring the undivided attention and best efforts of our citizens. In furtherance of such defense and in the exercise of police power of the State in protection of its citizens, all public employees are hereby declared to be civil defense workers subject to such civilian defense activities as may be assigned to them by their superiors or by law."

As an employer, the government may require public employees to perform civil defense duties by virtue of and as a part of their employment. Civil defense activities are a part of the function of government and the government, as a part of the duties of public employees, could assign civil defense duties to all or to some and not to others. In the case of *United Public Workers v. Mitchell,* 330 U. S. 75, 91 L Ed. 754 (1947),

it was held that the government could regulate the activities of its own employees. In this case it was held that the Hatch Act of 1940 prohibiting government employees from engaging in certain political activities was constitutional. At 330 U. S. 101, the Court said:

> "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."

The privilege of state employment is similar to the privilege of attending a state university, and the government may attach reasonable conditions to public employment. Also, petitioner has no privilege or right of public employment free from the duties and obligations thereof. In *Hamilton v. University of California,* 293 U. S. 245, 352, 79 L. Ed. 343 (1934), the Court, in discussing the privilege of attending the state university, declared:

> "The 'privilege' of attending the university as a student comes not from federal sources but is given by the State. It is not within the asserted protection. . . .
>
> "California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education. Taken on the basis of the facts alleged in the petition, appellants' con-

tentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance."

Section 3100 of the California Government Code relates to all public employees alike and does not favor some at the expense of others.

Public employees can, for purposes such as here involved, constitute a complete class, and therefore as the California legislation affects the whole of the class, there has been no discrimination as to the petitioner and no denial of equal protection of the law. In *Krebs v. Board of Trustees of Teachers Retirement System,* 410 Ill. 435, 102 N. E. 2d 321, it was contended that if the act be construed as offering an insurance contract to retired teachers it was invalid as discriminatory. At the bottom of page 325 of 102 N. E. 2d, the court answered:

> "A classification of public school teachers as a distinct class for appropriate legislation cannot be successfully challenged. . . ."

The classification of public employees as civil defense workers is a reasonable and not an arbitrary classification and is related to civil defense. Public employees are the logical class of persons to provide the framework for any system of civil defense. They are the representatives and agents of the government

and the persons to whom the government must look in carrying out its governmental functions. They are the persons in authority and the ones to whom the public looks for direction and aid. Their activities comprise an essential and integral part of any program of civil defense and are closely concerned with the maintenance of public welfare and safety. In any program of large magnitude it is essential that their activities be coordinated to render effective relief and aid when required. *The nature of their employment necessarily embraces civil defense activities, and they are not conscripted into any activity beyond the scope of their employment.* Neither is there anything in the Act which purports to conscript public employees into military service or which declares them to be subject to martial law.

The California statutes here involved were construed by the California Supreme Court as not constituting conscription of public workers into military service. The California Supreme Court further stated that public employees were not declared to be subject to martial law by this statute. In the case of *Pockman v. Leonard,* 39 Cal. 2d 676, 680 [249 P. 2d 267] (1952), the California Supreme Court declared:

> ". . . There is nothing in the act, however, which purports to conscript public workers into military service or which declares them to be subject to martial law. . . ."

Construction by the highest court of a state of a state statute is a ruling on a question of state law that is binding on the United States Supreme Court.

Terminiello v. Chicago, 337 U. S. 1, 93 L. Ed 1131 (1949);
Wilson v. North Carolina, ex rel. Caldwell, 169 U. S. 586, 42 L. Ed. 865 (1898);
Pennekamp v. Florida, 328 U. S. 331, 90 L. Ed. 1295 (1946);
Fox v. Washington, 236 U. S. 273, 59 L. Ed. 573 (1915);
Winters v. New York, 333 U. S. 507, 92 L. Ed. 840 (1948);
Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066 (1937);
Kovacs v. Cooper, 336 U. S. 77, 93 L. Ed. 513 (1949);
Musser v. Utah, 333 U. S. 95, 92 L. Ed. 562 (1948);

A state has broad powers in making classifications for purposes of enacting laws and the reasonableness of the classification for carrying out the purposes of the legislation is presumed.

These principles are very well expressed in the following quotations from Volume 12 of American Jurisprudence.

> "One of the basic principles involved in considering the validity of legislation assailed under equality provisions of the Federal and State Con-

stitutions is that in the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, the state is recognized as enjoying a wide range of discretion. Therefore, whenever the power to regulate exists, the details of the legislation and exceptions proper to be made rest primarily within the discretion of the state legislature."

12 Am. Jur., p. 213-214, Const. Law, Section 520.

". . . in those cases in which laws are attacked as violating the equality requirements of the Federal and State Constitutions there is a presumption in favor of a legislative classification, of the reasonableness and fairness of legislative action, and of legitimate grounds of distinction, if any such grounds exist, on which the legislature acted. Hence, when the classification in a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . ."

12 *Am. Jur., p. 215, Const. Law Section 521.* To the same effect: *Louisville & Nashville Railroad Co. v. Melton,* 218 U. S. 36; *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78, 55 L. Ed. 369.

III.

PROVIDING FOR CIVIL DEFENSE IS A PROPER FUNCTION OF STATE GOVERNMENT; DOES NOT INVADE FEDERAL POWERS, AND THERE IS A REASONABLE NECESSITY FOR SUCH LEGISLATION.

A. The state has the inherent power of self-preservation and the power and duty to enact legislation to protect the health, safety, and welfare of its citizens.

It has the duty to protect the lives and property of its citizens from internal and external forces of violence. In *Hamilton v. University of California, supra,* at 293 U. S. 260, the Court said:

> ". . . The states are interested in the safety of the United States, the strength of its military forces and its readiness to defend them in war and against every attack of public enemies.
>
> "Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies. . . ."

In *Gitlow v. New York,* 268 U. S. 652, 668, 69 L. Ed. 1138 (1925), the Court said:

". . . In short, this freedom does not deprive a state of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied. . . ."

In *Steiner v. Darby,* 88 Cal. App. 2d 481, at 485 [199 P. 2d 429], the Court said:

"The people of the State of California are supreme and have the undoubted right to protect themselves and to preserve the form of government which they have adopted against any and all enemies whether they be domestic or foreign. It is not alone the right of the people to protect themselves and their chosen form of government against attack from all sources, but it is their duty to do so, since they have guaranteed to the people of the United States 'a Republican Form of Government' in this state. (U. S. Const., Art. IV, Sec. 4; Const. of Calif., Art. 1, Sec. 3.)"

B. The state, in providing for civil defense, does not usurp any powers of the Federal Government and is performing necessary and proper functions in cooperation with the federal government.

This is made clear by the declaration contained in Section 2 of the Federal Civil Defense Act of 1950 to the effect that the federal government is relying upon the states to provide systems of civil defense as a part of the program for national defense. This declaration is entitled "Declaration of Policy" and reads in part:

> "It is the policy and intent of Congress to provide a plan of civil defense for the protection of life and property in the United States from attack. *It is further declared to be the policy and intent of Congress that this responsibility for civil defense shall be vested primarily in the several states and their political subdivisions.* . . ." (U. S. Code Congressional Service, 81st Congress, Second Session 1950, page 1262). (Emphasis added).

The state retains the right of self defense under the Federal Constitution, Article I, Section 8, as exemplified by the state militia, until Congress under the war and army powers curtails it. In Selective Draft Cases, 245 U. S. 316, at page 382, the Court in referring to federal war powers said:

> "But the duty of exerting the powers thus conferred in all its plenitude was not made at once obligatory, but was wisely left to depend upon the discretion of Congress as to the rising of the exigencies which would call it in part or in whole into play. There was left therefore, under the sway of states, undelegated, the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies."

At present, the active state militia, the National Guard and the Naval Militia, are voluntary, but every able-bodied male citizen in the State, between 18 and 45 years and not a member of these organizations, is by law designated a member of the unorganized militia

and subject to being called into the active militia (Military and Veterans Code, Sections 120-123). If the state can assign military defense duties then, *a fortiori,* it can assign civilian defense duties.

That there is a current necessity for civil defense legislation is shown by the proclamation of the President of the United States on December 16, 1950, in declaring a national emergency. After preliminary recital, the proclamation reads as follows:

> "Now, therefore, I, Harry S. Truman, as President of the United States, do proclaim the existence of a national emergency which requires that the military, naval, air and *civilian* defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace. . ." (Emphasis added).

There is no question but what we are in an era of sudden and undeclared wars and are conducting military activities and operations in many parts of the world; that scientific developments in recent years have made our country susceptible to attack, and that such attack might be forthcoming without warning. There are also internal and external pressures and activities at work opposed to and designed for the forceful overthrow of our form of government. The possibility of an attack is not remote but clear and present;

and to wait until such an attack should occur before making preparations for defense, for counteracting the effect of such an attack, for providing adequate aid where needed, and for the protection of lives and property, might well have disastrous consequences and leave no time for devising effective procedures for defense and aid.

Barsky v. United States, 167 F. 2d 241 (1948).

The cases referred to by petitioner have no application to civil defense legislation. They deal with the power of a governor to declare a state of martial law and the extent of permissible operations under a suspension of civil government.

The civil defense acts were enacted under existing civilian government by the legislature of the state to provide a current public need. They only relate to petitioner in her capacity as a public employee, but even if some individual right or liberty of hers were affected, it is a well settled principle that individual activities are subject to non-discriminatory regulation and control under the state's police power in the public interest and need.

In *Noble State Bank v. Haskell,* 219 U. S. 104, 55 L. Ed. 112 (1911), the Court in upholding the constitutionality of a state act requiring banks to contribute to a deposit guarantee fund said at 219 U. S. 110:

> "It may be said in a general way that the police power extends to all the great public needs. *Cam-*

field v. United States, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necesssary to the public welfare."

To the same effect: *Jacobson v. Massachusetts,* 197 *U. S. 11, 49 L Ed 643 (1905),* compulsory vaccination; *Gitlow v. New York,* 268 U. S. 652, 69 L Ed 1138 (1925); and *Whitney v. California,* 274 U. S. 357, 71 L Ed 1095 (1927), prevention of incitements of overthrow of government by force and violence.

The finding by the state legislature that there is a need for civil defense legislation is deserving of the greatest weight.

The attitude of courts to this type of legislation is thus generally expressed:

"All general principles relating to the presumptions of validity surrounding legislation and to the duty of the courts to uphold legislative action if possible apply with particular emphasis to exercises of the police power. The constitutionality of such measures is presumed, and it must also be presumed that the legislature has carefully investigated and determined that the interests of the public require such legislation, for the courts are reluctant to attribute a want of good faith in the exercise of the power. Moreover, it is their duty to sustain police measures unless such are clearly, plainly, and palpably in violation of the

Constitution. It is not enough that the case is a doubtful one; the act must be so clearly unreasonable that the court can say that no fair-minded man can think it reasonable. An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance." 11 *Am. Jur.*, Sec. 306 (pages 1088-89). To same effect: *Gitlow v. New York, supra,* 268 U. S. 652, 667.

The Federal Government has also expressed the need for civil defense measures by the state as a part of the program of national defense. ("Declaration of Policy," Federal Civil Defense Act, *supra.*)

IV.

THE STATUTES OF THE STATE OF CALIFORNIA PROVIDING FOR CIVIL DEFENSE ARE DEFINITE AND ESTABLISH ASCERTAINABLE STANDARDS AND DO NOT OPERATE TO DEPRIVE PETITIONER OF DUE PROCESS OF LAW.

The civil defense measures do not deprive petitioner of any right or privilege of public employment, but only prescribe reasonable qualifications for such employment.

The state program for civil defense is comprehensive and thorough. Sections 3100-3109 of the California Government Code only supplement the program by formally declaring public employees to be civil defense

workers, as an essential part of the civil defense program, and requiring public employees and other civil defense workers to take the loyaity oath. The basic civil defense program is set forth in the California Disaster Act of 1950, as revised by the California Defense Act of 1950 at the Third Extra Session of 1950. The acts have also been codified in Sections 1500-1601 of the California Military and Veterans Code. Those acts provide for the creation of State and local disaster councils and for the over-all supervision of the entire system of civil defense by the Governor and the office of Civil Defense.

The Civil Defense program has been in effect in California since 1950, and at present civilian defense activities are confined to planning and preparation. The civil defense system is to go into effective operation only in the event of an extreme emergency, as defined in the defense acts. The California statutes also set forth the mechanics for declaring an extreme emergency and the function which the various departments are to perform to provide aid in the form of food, clothing, medicine and other supplies, emergency housing, fire fighting, rescue and first aid, and health and medical services. Provisions are also made for mutual aid regions and mutual aid agreements and the creation of local disaster councils by ordinance.

The general purpose of the California Disaster Act is set forth in Section 2 of the act as follows:

> "Sec. 2. (a) Because of the existing and increasing possibility of the occurence of disasters

or emergencies of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, and in order to insure that preparations of this State will be adequate to deal with such disasters or emergencies, and generally to provide for the common defense and to protect the public peace, health, and safety, and to preserve the lives and property of the people of the State, it is hereby found and declared to be necessary: (1) to provide for an Office of Civil Defense within the Governor's Office and to prescribe the powers of the director of that office; (2) to confer upon the Governor the powers provided herein; (3) to provide for the rendering of mutual aid among cities, counties, districts, or other local governmental agencies or public agencies authorized by law, and with other states, and with the Federal Government with respect to the carrying out of civil defense functions; and (4) to authorize the establishment of such organizations and the taking of such steps as are necessary and appropriate to carry out the provisions of the California Disaster Act.

"(b) It is further declared to be the purpose of this act and the policy of the State that all civil defense functions of this State be coordinated as far as possible with the comparable functions of the Federal Government including its various departments and agencies, of other states and localities, and of private agencies of every type, to the end that the most effective preparation and use may be made of the Nation's manpower, resources,

and facilities for dealing with any disaster that may occur."

Other exemplary provisions of the program are set forth below:

Sections 1505 and 1505.5, California Military and Veterans Code define a state of extreme emergency as follows:

"Sec. 1505. As used in this chapter, 'state of extreme emergency' means the duly proclaimed existence of conditions of extreme peril to the safety of persons and property within the State caused by an enemy attack or threatened attack by land, sea, or air, or when upon the advice of the commanding general of this area, such an attack is imminent, an air raid alarm, sabotage, or other cause such as fire, flood, storm, epidemic, riot or earthquake, which conditions by reason of their magnitude are or are likely to be beyond the control of the protective services, personnel, equipment and facilities of any single county, city and county, or city and require the combined forces of a 'mutual aid region or regions' to combat. 'State of extreme emergency' does not include nor does any provision of this chapter apply to any condition resulting from a labor controversy.

"Sec. 1505.5. A 'state of extreme emergency' exists immediately and without a proclamation thereof by the Governor whenever this State is attacked by an enemy of the United States by the use of atomic weapons. A period of a state of extreme emergency existing as provided in this

section shall be ended in the same manner as a state of extreme emergency proclaimed by the Governor."

Section 1580 states the circumstances under which the Governor may declare an extreme emergency and reads as follows:

"The Governor is hereby empowered to proclaim a state of extreme emergency in an area or region affected or likely to be affected thereby when:

"1. He finds that some or any of the circumstances described in Section 1505 exist; and either

"2. He is requested to do so (a) in the case of a city by the mayor or chief executive, (b) in the case of a county by the chairman of the board of supervisors; or

"3. He finds that local authority is inadequate to cope with the peril.

"Such proclamation shall be in writing and shall take effect immediately upon its issuance. As soon thereafter as possible it shall be filed in the office of the Secretary of State. The Governor shall cause widespread publicity and notice to be given of such proclamation."

Section 1571 provides in part:

"Sec. 1571. Counties, cities and counties, and cities may create disaster councils by ordinance. A disaster council shall develop a plan for meeting any condition of extreme peril or any condition which is specified in Section 1505 as constituting

the basis for a declaration of extreme emergency; such plan shall provide for the effective mobilization of all the resources of the community, both public and private. The legislative body of a county, city and county or city may in such ordinance or by resolution adopted pursuant to such ordinance, provide for the organization, powers and duties, divisions, services and staff of the civil defense and disaster organization. The legislative body of a county, city and county or city may, by resolution, authorize public officers, employees and registered volunteers to command the aid of citizens when necessary in the execution of their duties during a period of a state of extreme emergency.

"Counties, cities and counties, and cities may enact ordinances and resolutions and either establish rules and regulations or authorize disaster councils to recommend to the local director of civil defense rules and regulations for dealing with local emergencies that can be adequately dealt with locally; and further may act to carry out mutual aid on a voluntary basis, and to this end may enter into agreements. . . ."

The County of Los Angeles, pursuant to the grant of authority in the last above quoted section (Section 1571, California Military and Veterans Code) adopted Ordinance No. 5582 and established Civil Defense duties and responsibilities for public employees of Los Angeles County, of which petitioner Marjorie Bowen was one. This ordinance places the general supervi-

sion of the local civil defense program under the control of the county chief administrative officer acting under the direction of the county board of supervisors. Exemplary provisions of the ordinance are as follows:

> "Sec. 28. Subject to the provisions of ARTICLE III hereof, the Chief Administrative Officer shall have general supervision for carrying out, by all means established in this ordinance, of the duties and responsibilities of all of the services, agencies, auxiliaries, officers, offices and positions provided under authority of this ordinance."
>
> "Sec. 33. The Chief Administrative Officer shall cause the preparation of, and issue, upon approval of the Board, an administrative manual supplementing this ordinance, which will specifically define the procedure to be followed and the powers and duties of the services, agencies, auxiliaries, officers and employees and non-county personnel, whether volunteer or otherwise."

Section 41 sets forth the various disaster services to be provided by county employees, and the general types of services are outlined below:

a. A *communication* service.

b. *A fire service* which shall suppress fires and rescue people trapped in burning structures.

c. A disaster *law enforcement* service which shall be rendered by the Sheriff's Department which already has this authority.

d. Disaster *utility service* which shall maintain inventory of all County-owned equipment and provide emergency light and power units.

e. Disaster *public works* service which shall arrange for an emergency repair of roads, bridges, and public facilities.

f. Disaster *medical evacuation* and medical service which shall arrange for emergency medical care.

g. A disaster local *public health* service which shall be responsible for sanitary measures concerning water, supplies, food, and shall cope with epidemics and enforce quarantines.

h. Disaster *coroner service* which shall be responsible for the identification and disposition of the dead.

i. Disaster *property procurement* service which shall maintain an inventory of privately-owned commodities in warehouses.

"Sec. 43. Each Disaster Service as provided in this article shall be subject to the general direction and supervision of the Chief Administrative Officer in the discharge of the latter's duties and responsibilities."

"Sec. 50. *Unless otherwise provided through authority of this ordinance, all County employees who perform services for the Disaster Relief Authority shall do so in connnection with the usual duties of their department and subject to other routine conditions of their County employment.*" (Emphasis added).

"Sec. 53. Every department, commission, agency, board officer and employee of the County and of every County District, as authorized by the California Disaster Act and said Sections 53020

> to 53023 of the Government Code, shall cooperate with and assist the Chief Administrative Officer and the Disaster Services when so directed by the Board of Supervisors, to accomplish the objectives of this ordinance. While engaged in such cooperation such officers and employees shall be deemed to be engaged in their County and District duties and all time consumed in such cooperation shall be time legally spent in the service of such department, commission, agency, board, officer or district in or by which they are employed."

Los Angeles County employees have not been required to perform any civilian defense duties with the exception of first aid training. Such duties as they have been requested to perform are entirely within the course and scope of their present employment. In *Pockman v. Leonard,* 39 Cal. 2d 676 [249 P. 2d 267], the court in commenting on Sections 3100-3101 of the California Government Code said at 680:

> "Petitioner also claims that the act improperly subjects him to assignment to activities outside and beyond his regular duties. It is clear, however, that a teacher may properly be assigned certain duties relating to civil defense, such as the instruction of pupils regarding their behavior during atomic explosions, air raids or other attacks. Tasks of this type, like the holding of fire drills, are within the scope of the duties of a teacher and may be properly required of him regardless of the fact that they may also constitute civil defense activities. There is no complaint

that any specific civil defense duties have been imposed on petitioner under the act, and we should not assume that any improper assignments will be made. The provision that workers are subject to such activities 'as may be assigned to them by their superiors or by law' does not, as asserted, invalidly delegate legislative power to define and impose civil defense duties. Instead, the reasonable construction is that the superiors in making assignments, are limited to such authority as they already have or may subsequently be granted by law."

In this respect the court is being requested to render only an advisory opinion based on theoretical speculation, and the petition presents no justifiable controversy to the court calling for judicial determination.

In *United Public Workers v. Mitchell,* 330 U. S. 75, 89, 91 L. Ed. 754 (1947), the Court said:

"As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions', are requisite. . . .;

". . . but the facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not

> make a justifiable case or controversy . . . Such generality of objection is really an attack on the political expediency of the Hatch Act, not the presentation of legal issues. It is beyond the competence of courts to render such a decision. . . ."
>
> "It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other. . . .
>
> "No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations."

Section 3100 of the California Government Code does not fix duties. The duties of the petitioner as a civil defense worker are clearly fixed by the California Legislature in the California Disaster Preparedness and Relief Act (Sections 1500 through 1601, California Military and Veterans Code) and Los Angeles County Ordinance No. 5582.

As was said in *Parker v. County of Los Angeles,* 338 U. S. 327, 94 L. Ed. 144 (1949), at 338 U. S. 333:

> ". . . the writs must be dismissed because constitutional questions which brought these cases here are not ripe for decision. . . ."

V.

PETITIONER IS NOT BEING FORCED INTO INVOLUNTARY SERVITUDE IN VIOLATION OF THE THIRTEENTH AMENDMENT.

Civil defense activities are related to the duties of employees in the public service and the participation of individuals in public employment is voluntary.

The Thirteenth Amendment was not intended to interdict enforcement of the duties which individuals owe the State. (*Butler v. Perry,* 240 U. S. 328, 60 L Ed 672 (1916)—compulsory labor on highways.)

Exaction of military duty would not render a statute repugnant to the Thirteenth Amendment, and neither do civil defense duties. In *Selective Draft Law Cases,* 245 U. S. 366, 390, 62 L Ed 349 (1918), the Court said:

> "Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement."

And in *Bailey v. Alabama,* 219 U. S. 219, 55 L Ed 191 (1911), the Court said:

"The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."

VI.

THE OATH REQUIRED BY SECTION 3103 GOVERNMENT CODE OF THE STATE OF CALIFORNIA DOES NOT VIOLATE ARTICLE I, SECTION 10(1) OF THE UNITED STATES CONSTITUTION.

This section provides in pertinent part:

"No state shall . . .; pass any bill of attainder, *ex post facto* law, . . ."

A. California Government Code Section 3103 does not constitute a bill of attainder.

A bill of attainder is defined in the case of *Cummings v. Missouri,* 71 U. S. 277, 323, 18 L. Ed. 356, as:

"A bill of attainder is a legislative act, which inflicts punishment without a judicial trial."

The California Government Code does not prescribe any punishment as a result of the execution of the oath. No punishment whatsoever is prescribed for any past act. Furthermore any employee of a public agency could have advocated the overthrow of the government by force and violence up to the day before he executed the oath and not be barred from taking

the oath. This oath constituted no more than the inquiry contained in the affidavit provision sustained by this Court in *Garner v. Board of Public Works, supra.*

We are here only concerned with *qualifications* for public employment and not *punishment* for any offense.

Further if any doubt remains as to whether or not the oath required by Section 3103 of the California Government Code constitutes a bill of attainder, it is completely dispelled by the fact that there can be no discharge even for failure to take the oath without full opportunity by any public employee to have the matter reviewed by a judicial hearing before the Civil Service Commission. In this instance, we therefore have no bill of attainder because:

1. There is no discharge because of past membership or past advocacy, and

2. There can be no discharge of an employee for failure to take the oath without a judicial hearing.

B. The oath required by Section 3103 of the California Government Code does not constitute an *ex post facto* law.

In *Thompson v. State of Utah,* 170 U. S. 343, 351, 42 L. Ed. 1061, the Court said that a penal statute is an *ex post facto* law " . . . which by its necessary operation and 'in its relation to the offense, or its consequences, alters the situation of the accused to his

disadvantage.' " It was decided at an early date that the phrase "*ex post facto*" applied only to retrospective criminal statutes. *Caider v. Bull,* 3 DAL 386.

In *Cummings v. Missouri,* 71 U. S. 277, 326, 18 L. Ed. 356, it is stated:

> "By an *ex poste facto* law is meant one which imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."

As no punishment whatsoever is prescribed for either past advocacy of the overthrow of the government by force or violence or past membership in an organization which so advocates, Section 3103 of the California Government Code does not constitute an *ex post facto* law.

This oath is worded in such a manner that a public employee could execute the oath even though he had formerly advocated the forceful overthrow of the government and even though he had formerly been a member of such an organization that so advocated. No public employee was barred from executing the oath because of any past act. This distinction in fact controls the application of the cases. The principles of *Cummings, Garland* and *Lovett* cases do not apply to this factual situation.

CONCLUSION

Wherefore, Respondents pray that the Petition for Writ of Certiorari to the Supreme Court of the State of California be denied.

Respectfully submitted,

HAROLD W. KENNEDY, County Counsel
and
GERALD G. KELLY, Assistant County Counsel,
and
JAMES W. GOODMAN, Deputy County Counsel
Attorneys for Respondents.